

ISLANDS (SCOTLAND) ACT 2018

EXPLANATORY NOTES

OVERVIEW OF THE ACT

PART 6 – DEVELOPMENT IN THE SCOTTISH ISLAND MARINE AREA

Key definitions

Section 22 – Meaning of “development activity”

52. This section defines “development activity” for the purposes of Part 6 of the Act, setting out the kinds of activity which are to be subject to the licensing scheme to be created by regulations under section 24.
53. Subsection (1) provides for sea-based construction, alteration and improvement works in general, and also for dredging, to be “development activities” and thus licensable under this Part. These are also licensable (along with numerous other activities) under the marine licensing regime created by Part 4 of the Marine (Scotland) Act 2010 (“the 2010 Act”).
54. Paragraphs (a) to (c) of subsection (2) explicitly exclude activities relating to the reserved areas of oil and gas, defence and pollution from the definition of “development activity”. Therefore these activities will not be subject to the requirement for a licence under regulations made under section 24. This makes similar provision to section 34 of the 2010 Act. Paragraph (d) of subsection (2) also excludes fish farming from the definition of “development activity” – again, this will not be subject to the requirement for a licence under regulations made under section 24. This is because planning permission from a local authority is already required for fish farming. In this way the Act is consistent with the Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007 ([S.S.I. 2007/268](#)), which provided amendments to a range of primary and secondary legislation to allow for the consideration of planning applications for new fish farms by planning authorities. This included amendments to the Orkney County Council Act 1974 and the Zetland County Council Act 1974 to disapply the provisions relating to works licences in respect of the placing or assembly of equipment in marine waters for the purposes of marine fish farming. The definition of fish farming itself is imported from section 26 of the Town and Country Planning (Scotland) Act 1997 – that is, “the breeding, rearing or keeping of fish or shellfish (which includes any kind of crustacean or mollusc).”
55. Paragraph (e) of subsection (2) provides that, as well as fish farming under paragraph (d) of subsection (2), other forms of fishing are not defined as a development activity under the Act.

Section 23 – Meaning of “Scottish island marine area”

56. This section defines the “Scottish island marine area” for the purposes of Part 6. This is the geographical area which the new licensing scheme created under this Part will cover.

57. The first limitation on “Scottish island marine area” is that it is part of the “Scottish marine area” as that term is defined in Part 1 of the 2010 Act. The “Scottish marine area” is itself within the seaward limits of the territorial sea of the United Kingdom and includes the bed and subsoil of the sea within that area. The boundaries between the parts of the territorial sea for Scotland and other parts of the United Kingdom are determined under an Order in Council made under section 126(2) of the Scotland Act 1998 – currently the Scottish Adjacent Waters Boundaries Order 1999 (S.I. 1999/1126). Within that, the “Scottish island marine area” is therefore further defined as that portion of Scotland’s territorial sea (the Scottish marine area) which is up to a radius of 12 nautical miles from an island, measured from the low water mark of the ordinary spring tide. Although section 24(2) qualifies the practical application of the licensing regime to areas that are adjacent to an inhabited island, any island (whether inhabited or uninhabited) counts for the prior conceptual purpose of measuring the 12-mile radius, as there may be some variation in habitation over time.

Licensing of development activities

Section 24 – Scottish island marine area licence

58. This section gives a regulation-making power to the Scottish Ministers to establish a licensing scheme in respect of development activities within the Scottish island marine area. Under the regulations a person will not be able lawfully to carry out a development activity in an area designated under regulations as an “island licensing area” without first obtaining a licence from a local authority; and if such a licence is granted, will have to carry out the activity in compliance with its terms.
59. Subsection (2) sets out two preconditions for an area to be designated as an “island licensing area”. First, a local authority would have to apply to Ministers for a designation to be made by scheme regulations; and secondly, before making those regulations, Ministers would have to be satisfied that the area which is to be designated included at least one inhabited island. If Ministers decided to make scheme regulations designating an area as an “island licensing area”, those regulations would either set out the detail of the scheme, or add the newly designated area to an existing scheme. In either case, before laying a draft of the regulations, Ministers are required under subsection (7) to consult the persons there mentioned.
60. Subsection (3) provides for particular aspects of the scheme that the regulations may make provision about. This list is not exhaustive.
61. Subsection (3)(a) provides that the regulations may set out the particular types of development activity covered by or exempted from the scheme.
62. Subsection (3)(b) provides that the regulations may further define the area and boundaries of the Scottish island marine area; allocate responsibility within it as between different local authorities; and also define island licensing areas.
63. Subsection (3)(c) provides that the regulations may set out the procedure in relation to applications for licences, including: any pre-application requirements; the procedure for the issue, renewal, variation, transfer, suspension and revocation of a licence; the procedure for an appeal of a decision in relation to a licence (e.g. the refusal of a licence); for fees to be charged by local authorities; and for the holding of an inquiry.
64. Subsection (3)(d) provides that the regulations may set out the effect of an application and of a grant of a Scottish island marine licence on an application for, or a grant of, a marine licence under Part 4 of the 2010 Act; and their effect on an application for, or a grant of, consent under section 36 of the Electricity Act 1989 in relation to the construction, extension or operation of electricity generating stations.
65. Subsection (3)(e) provides that the regulations may provide for their own enforcement, including by the issuing of compliance notices or remediation notices, as so defined.

66. Subsection (3)(f) provides that the regulations include a power for remedial works to be carried out where a development activity has been carried on otherwise than in accordance with a licence: that is either without a licence at all or in breach of the terms of a specific licence.
67. Subsection (3)(g) provides that the regulations may create offences and penalties both for the contravention of a general prohibition on a development activity within the Scottish island marine area (i.e. where it is carried on without a licence) and for the contravention of a restriction contained in the terms of a specific licence.
68. Subsection (3)(h) provides that the regulations may make provision for exceptions and defences to offences created by virtue of subsection (3)(g).
69. Subsection (3)(i) provides that the regulations may provide for the imposition of fixed monetary penalties in relation to a contravention of the regulations that is made a criminal offence by virtue of subsection (3)(g) and (h).
70. Subsection (3)(j) provides that the regulations may make provision about the publication of information relating to licences in public registers maintained by local authorities (including about the fees payable for access and the circumstances in which a person can request non-publication).
71. Subsection (4) provides that any fees to be charged by local authorities under regulations are to be for reasonable administrative costs in relation to deciding a licence application.
72. Subsection (5) prescribes the maximum penalties in both summary and solemn procedure if the regulations made under subsection (1) do create criminal offences.
73. Subsection (6) provides that where regulations made under subsection (1) do create fixed monetary penalties then such penalties are to be imposed only where the local authority concerned is satisfied to the criminal standard of proof that an offence has been committed; that such penalties are to be imposed only by notice; and also provides that such penalties cannot exceed £50,000 in respect of each contravention of the regulations.
74. Subsection (7) provides that before laying a draft of regulations under subsection (1) before the Scottish Parliament the Scottish Ministers must consult persons representing the interests of island communities and those likely to be affected by the regulations (mirroring the consultation requirements in sections 4(1) and 11(2) of the Act). The regulations will also be subject to the affirmative procedure – see section 29(2) of the Act.

Section 25 – Exception from requirement for licence

75. This section makes saving provision in respect of the licensing scheme to be established by regulations under section 24. It provides that the licensing scheme does not apply to a person carrying out a development activity in an area designated under the regulations as an “island licensing area”, if before the relevant designation was made:
 - the person was already carrying out a development activity;
 - the person has a lease or an agreement to lease in order to carry out a development activity – in practice this would usually be granted by a Crown Estate body;
 - the person has commenced the pre-application consultation for a marine licence required under sections 22 to 24 of the 2010 Act;
 - the person has made an application for – or already been granted – a marine licence under Part 4 of the 2010 Act;

*These notes relate to the Islands (Scotland) Act 2018
(asp 12) which received Royal Assent on 6 July 2018*

- the person has made an application for – or already been granted – a works licence under the Orkney County Council Act 1974 or the Zetland County Council Act 1974.

Section 26 – Crown application

76. By virtue of section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010, the Act applies to the Crown in Scotland generally (including to Crown land). However, subsection (1) of this section provides that nothing in this Part of the Act makes the Crown criminally liable: therefore, should it be in contravention of regulations made under section 24 on Scottish marine area licences, the Crown would be absolved of criminal liability. Instead, subsection (2) provides for the Court of Session, on an application by the Lord Advocate, to declare such an act to be unlawful.
77. Subsection (3) clarifies that, despite the effect of subsection (1) in relation to the Crown itself, it is still possible for persons in the service of the Crown to be criminally liable under this Part of the Act.